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No. 32

In the Supreme Court of the United States

OCTOBER TERM, 1928

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, SUED IN THE NAME OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, AND CONSOLIDATED NAVIGATION COMPANY, INC., PETITIONERS

v.

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN AD LITEM, JOHN A. LYDECKER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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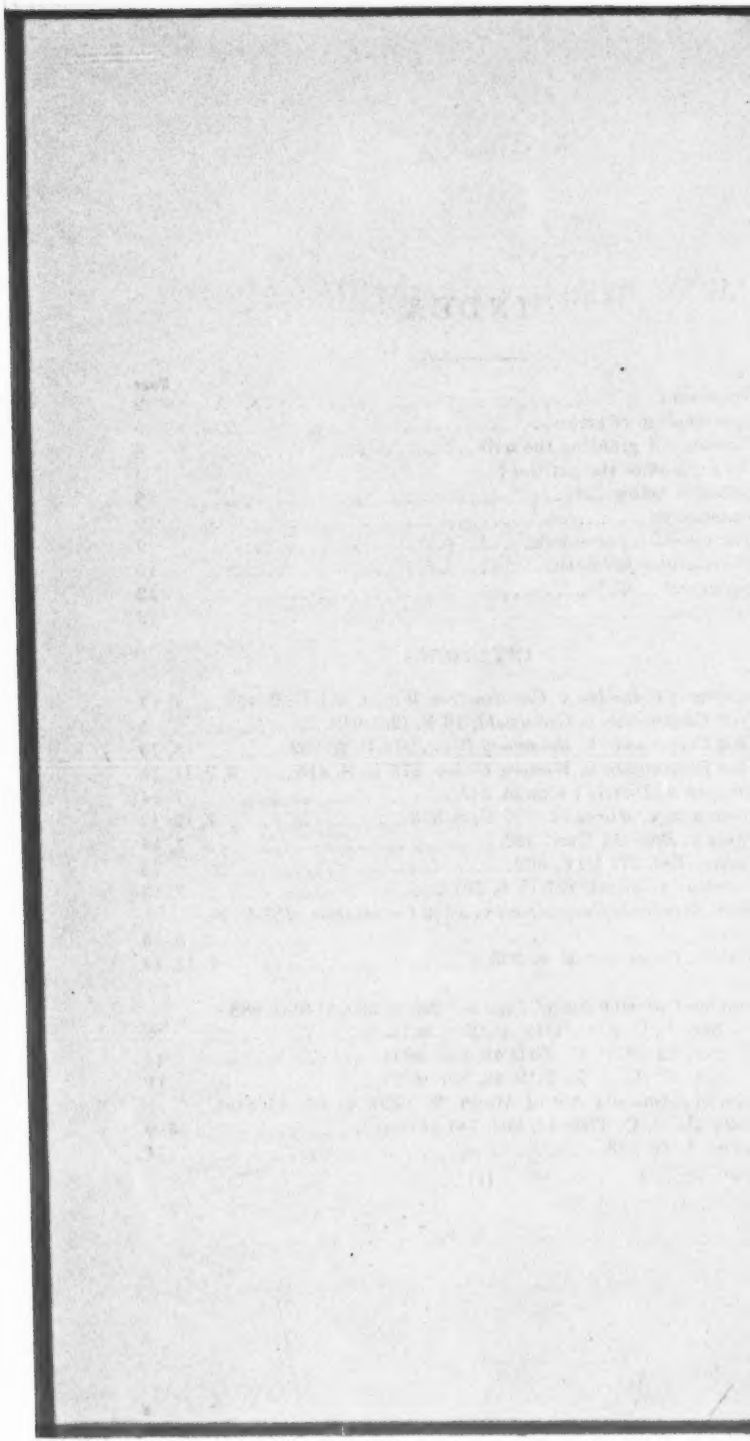

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v.

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN AD LITEM, JOHN A. LYDECKER

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States Shipping Board Merchant Fleet Corporation, sued in the name of the United States Shipping Board Emergency Fleet Corporation, and on behalf of the Consolidated Navigation Company, Inc., prays that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Second Circuit (R.

356), entered in the above case on November 5, 1928, affirming the judgment of the District Court of the United States for the Southern District of New York. (R. 33.)

STATEMENT

This case involves the question whether the Fleet Corporation and/or the operating agent of a vessel owned by the United States can be held responsible in actions at law for personal injuries sustained by a seaman, because of wrongful acts done at sea by the Master of the vessel and not resulting through personal negligence on the part of the Fleet Corporation and/or the operating agent, such action being in substance against the United States, the Fleet Corporation having no corporate interest in the vessels or their operation.

The *Coelleda*, upon which Lustgarten had shipped as a seaman, was owned by the United States and operated for it by the Consolidated Navigation Company, Inc., under a contract between the United States and that Company (R. 56, 329), by the terms whereof the Company was employed "as its agent to manage, operate, and conduct the business of" the vessel, "in accordance with the directions, orders, and regulations" of the owner; and "subject to such restrictions and in such manner as the owner may prescribe," "to man, equip victual, and supply" the vessel and pay "for account of the owner" the cost thereof and all other costs of the operation; subject to the requirements and

at the expense of the United States, to use reasonable care for the maintenance of the vessel; to exercise care to protect the United States from loss of any kind; to be "subject to the orders of the owners and its authorized representatives as to voyage, charters, rates of freight, and other charges and as to all other matters connected with the agency"; to issue charters and shipping documents in form approved by the United States; to collect freight and all other moneys accruing to the United States from the operation; to deposit all such collections, separately, in the name of the Fleet Corporation, in a bank approved by the United States, to be drawn upon only as directed by it; to keep and render to the United States accounts as the latter might prescribe; in general average cases, to appoint adjusters approved by the United States; and to operate under a trade name approved by the United States, and not under its own trade name. The agent was prohibited, without the approval of the United States, from contracting, in respect to the operation, with any concern in which the agent should be interested, and from operating any foreign flag vessel in competition with any Shipping Board line. The record shows no further connection of the Fleet Corporation with the ship or her operation than the fact that it executed the agency agreement as agent for the United States which was named as the contracting party. (R. 329.) The services of the Fleet Corporation were

of a public nature on behalf of the United States as in *Fleet Corporation* v. *Western Union Telegraph Company*, 275 U. S. pp. 421, 422.

Lustgarten began an action at law in the District Court of the United States for the Southern District of New York against the Fleet Corporation and the operating agent to recover damages upon two causes of action stated: the first, for injuries at sea resulting from the lurching of the vessel, and the second, because afterwards the Master required him, while ill, to work several hours in the galley and denied him necessary treatment and attention, causing hemorrhages resulting in tuberculosis. The evidence tended to show his chest and lungs had been injured by his being thrown against the rail by a sea which boarded the vessel. His contention was that tuberculosis which afterwards developed would not have resulted but for the fact that after his injury he was required to work for a few hours in the galley. The court dismissed the first cause of action, but against objection submitted the second cause of action to the jury for determination, although the testimony that the tuberculosis resulted from the improper acts of the Master was at most highly speculative in character and rested upon the opinion of a single doctor which was contradicted. (R. 4–7, 63, 227–229, 264.)

Answers were filed by the Fleet Corporation and the operating agent denying liability and asking dismissal upon the ground that, as the only relations which the Fleet Corporation and the operat-

ing agent had with the vessel (the negligence complained of being the negligence of the Master) were those as agent for the United States, the action could not be maintained against them, and, in fact, was against the United States and the relief asked differed from that provided by the Suits in Admiralty Act of March 9, 1920. (R. 9–18.) The jury found a verdict for $10,000. Motion to set aside the verdict was overruled and judgment entered thereon. (R. 33, 322, 323.) Writs of error were sued out to the Circuit Court of Appeals, the substantial errors assigned (R. 345–350) being that the highly speculative nature of the testimony that tuberculosis resulted from the Master's negligence did not justify the verdict, and upon the ground that neither the Fleet Corporation nor the operating agent could be sued, as they were agents of the United States and the suit, therefore, in substance one against the United States. The appellate court affirmed on the supposed authority of *Sloan Shipyards Corporation* v. *Fleet Corporation,* 258 U. S. 549, and *Fleet Corporation* v. *Greenwald,* 16 F. (2d) 948. (R. 355.)

SPECIFICATION OF ERRORS

Both courts below erred:

1. In failing to dismiss the second cause of action as contrary to law and contrary to the weight of the evidence, as the proofs tending to establish the tubercular condition were uncertain and speculative and not sufficient to support a verdict.

2. In failing to dismiss the second cause of action against the Consolidated Navigation Company, Inc., as that Company was merely the operator of the vessel as the agent of the United States, and the injury complained of was rested upon the negligence of the Master and not the personal negligence of such agent.

3. In failing to dismiss the second cause of action against the United States Shipping Board Merchant Fleet Corporation, sued as the United States Shipping Board Emergency Fleet Corporation, as the Fleet Corporation was the public agent of the United States and the negligence complained of was the personal negligence of the Master of the vessel and not the personal negligence of the Fleet Corporation.

4. In failing to hold that the request for binding instructions directing the jury to find for the defendants should have been granted.

REASONS FOR GRANTING THE WRIT

Numerous actions on the law side by seamen and others are brought against the Fleet Corporation and/or the Fleet Corporation and agents operating Government vessels under agreements identical in form with the one here involved, for recovery of damages caused by negligence of the officers or members of the crew of such vessels, without personal neglect of the Corporation or such agents. Judgments are entered in these cases against the Fleet Corporation in its supposed capacity as a private corporation or the operating agent, or both,

as in this case. They have to be satisfied out of funds of the United States. It has been definitely determined that in the operation of these vessels the Fleet Corporation is a public agent "performing a function of the Government" (*Fleet Corporation* v. *Western Union Telegraph Company,* 275 U. S. 415, 424). The operating agent likewise is to be held a public agent without responsibility unless for personal negligence. To hold that such actions may be maintained against the Fleet Corporation or the operating agent conflicts with the decision of this Court in *Robertson* v. *Sichel,* 127 U. S. 507, 515, where the definite ruling is:

> A public * * * agent is not responsible for the misfeasances or postive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties—

and is in apparent conflict with the decisions in *Hodgson* v. *Dexter,* 1 Cranch, 345; *Parks* v. *Ross,* 11 How. 362; *District of Columbia* v. *Camden Iron Works,* 181 U. S. 453.

The effect of these judgments against the Fleet Corporation and the operating agent makes them in fact actions against the Government, as the responsibility for the payment of judgments entered is that of the United States, although in form against the agents. (*Minnesota* v. *Hitchcock,* 185 U. S. 373, 387; *Wells* v. *Roper,* 246 U. S. 335.) Upon these causes of action the United States has

consented to be sued as provided by the Suits in Admiralty Act of March 9, 1920, *supra*, which provides the exclusive remedy; otherwise there is entire lack of uniformity as to venue, service of process, rules of decision and procedure, rates of interest, and periods of limitation, which is necessary. This Court in *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202, while holding that that Act furnished an exclusive remedy in libel proceedings against the Fleet Corporation, declined to pass upon the question now presented whether the Act was exclusive so as to prevent resort to concurrent remedies against the Corporation on like causes of action in the Court of Claims or in courts of law against the Fleet Corporation.

The case of the *Sloan Shipyards Corporation* v. *Fleet Corporation* dealt with a case where it appeared that the Fleet Corporation had made a contract in its own name and apparently in its own behalf.

As these problems are present in every one of this considerable class of litigation, it is desirable and necessary for the ruling of this Court to be secured.

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

FEBRUARY, 1929.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

No written opinion was filed in the District Court, but the charge to the jury, requests for instructions and rulings thereon appear at pages 314–322 of the Record. The opinion of the Circuit Court of Appeals has not been reported but will be found at page 355 of the Record.

JURISDICTION

The judgment of the Circuit Court of Appeals to be reviewed was entered November 5, 1928. (R. 356.) The jurisdiction of this Court to issue the writ is found in the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether, for losses at sea sustained through the negligent acts of the Masters or members of the crews of Government owned and operated merchant vessels, actions at law may be prosecuted against the Fleet Corporation and/or the ships' operating agents appointed by the Government, or whether such actions must be prosecuted in the manner in which it has consented to be sued, under the terms of the Suits in Admiralty Act (c. 95, 41 Stat. 525; U. S. C. Title 46, Sec. 741 et seq.). There is involved no question of personal negligence on the part of the operating agent. Any activity of the Fleet Corporation is incident to the performance of its duties as a governmental agency so declared by specific legislation.

This question was specifically reserved for later consideration by this Court in *Fleet Corp.* v. *Rosenberg Bros.*, 276 U. S. 202.

THE STATUTES INVOLVED

Merchant Marine Act of June 5, 1920, c. 250, Sec. 1, 41 Stat. 993 (U. S. C., Title 46, Sec. 861):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.

and by authority of Sections 12 and 35 of the same Act (U. S. C. Title 46, Secs. 871, 886):

> SEC. 12. That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act, the provision in section 11 of the "Shipping Act, 1916," to the contrary notwithstanding.
>
> SEC. 35. That the power and authority vested in the board by this Act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation.

These sections declare the operation of Shipping Board vessels to be a function of the Government and the Fleet Corporation a governmental agency for that purpose. (*Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415, 421, 422.)

The related sections of the Suits in Admiralty Act are not here set out, as this Act has recently had careful review by this Court in *Fleet Corporation* v. *Rosenberg Bros.*, 276 U. S. 202.

STATEMENT

A statement of the facts and of the errors assigned will be found in the petition.

ARGUMENT

Numerous actions at law by seamen and others against the Fleet Corporation and agents for the operation of Government owned and operated ships, under contracts identical in form with that here involved, for the recovery of damages caused by negligence of officers or members of the crew of such vessels, are pending in State and Federal courts. The majority of such actions is commenced after the remedy against the Government provided by the Suits in Admiralty Act has become barred. Recovery is sought upon the doctrine of *respondeat superior*. The effect of such judgments is to hold the Fleet Corporation, in its supposed private capacity, or the operating agent, or both, as in this case, liable for obligations of the Government. Such actions, as the Government is responsible for the payment of any judgments entered, in fact, are against the Government, although in form against the agent.

Minnesota v. *Hitchcock*, 185 U. S. 373, 387.
Wells v. *Roper*, 246 U. S. 335.

The vessels involved are owned and operated by the United States in execution of the purpose specified in Sections 1 and 12 of the Merchant Marine Act of 1920 (*supra*). The operation of the ship must be declared in performance of a function of

Government. (*The Pesaro,* 271 U. S. 562, 574.) The sections of the Merchant Marine Act are to be so read and applied. This Court in *Emergency Fleet Corp.* v. *Western Union,* 275 U. S. at page 422, specifically ruled that the services of the Corporation in the operation or its interest in the operation of these vessels are of a public nature. We quote from the opinion:

> But in operating vessels, as in making sales, the Shipping Board and the Fleet Corporation were required by the Merchant Marine Act to proceed with a view to aiding in the development of an adequate merchant marine to serve, among other things, "as a naval and military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States." These services of the Fleet Corporation were obviously of a public nature. It has never done any business, or conducted any operation, except on behalf of the United States.

The activities of the operating agents are to be likewise so characterized. This Court has laid down the rule in *Robertson* v. *Sichel,* 127 U. S. 507, 515:

> A public * * * agent is not responsible for the misfeasances or positive wrongs, or for the nonfeasances or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties. Story on Agency, 319.

This rule is the basis of similar decisions in *Hodgson* v. *Dexter,* 1 Cranch, 345; *Parks* v. *Ross,* 11 How. 362; *District of Columbia* v. *Camden Iron Works,* 181 U. S. 453, as applied to contractual obligations. The Masters and seamen employed upon Government vessels are employees of the Government (34 Op. A. G. 363). As the losses in these proceedings are without personal negligence on the part of the Fleet Corporation and/or operating agents, it would follow that, as they are Government agents, they are not personally responsible and the actions should not successfully be prosecuted against them as they are. If an actionable wrong was committed, liability rests with the Government. The Government is responsible to pay judgments entered against operating agents or reimburse the agents for any payment made. Proceedings against the agent are in substance and effect actions against the Government under the doctrine of *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387, and *Wells* v. *Roper,* 246 U. S. 335. For these losses the Government has consented to be sued by the Suits in Admiralty Act of March 9, 1920. Relief by that Act was held exclusive with respect to admiralty proceedings against the Fleet Corporation. (*Fleet Corp.* v. *Rosenberg Bros.,* 276 U. S. 202.) This Court specifically reserved for future consideration the question—

> Whether in addition to furnishing an exclusive remedy in admiralty, the Act also

> prevents a resort to any concurrent remedies against the United States or the corporations on like causes of action in the Court of Claims or in courts of law. (P. 214.)

The case of *Sloan Shipyards Corporation* v. *Fleet Corporation,* 258 U. S. 549, relied on by the court below, arose on the pleadings, from which it was made to appear that the Fleet Corporation, acting in its own corporate interest, had made a contract in its own name and in its own behalf.

Unless the remedy provided in the Suits in Admiralty Act is exclusive, the application of uniform rules of practice, decisions, and procedure can not be secured. Varying rates of interest, periods of limitation, the venue for bringing the action, and methods of service of process must vary, depending upon the court (State or Federal) in which the action may be instituted. The questions thus suggested are important ones and should be definitely settled by the ruling of this Court.

It is respectfully submitted that the petition should be granted.

WILLIAM D. MITCHELL,
Solicitor General.
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Assistant Attorney General.
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FEBRUARY, 1929.

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